84-1400

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RAYMOND J. DONOVAN, Petitioner

v.

MARIO MEROLA, District Attorney, Bronx County, New York, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DIVISION FOR THE PURPOSE OF APPOINTING COUNSEL, ETHICS IN GOVERNMENT ACT OF 1978

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978 has jurisdiction to order, *ex parte*, disclosure of grand jury materials that are not portions of a Special Prosecutor's report, in apparent violation of 28 U.S.C. § 595(b)(3).

2. Whether the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978 may order, *ex parte*, disclosure of federal grand jury materials without requiring the applicant for such materials to make a showing of compelling necessity or particularized need.

STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1

The following parties may have an interest in the outcome of this proceeding:

Raymond J. Donovan
Schiavone Construction Company
Ronald A. Schiavone
Richard C. Callaghan
Joseph A. DiCarolis
Morris J. Levin
Albert J. Magrini
Gennaro Liguori
Robert Genuario
Jopel Contracting and Trucking Corporation
Joseph L. Galiber
William P. Masselli
Hon. Mario Merola, District Attorney, Bronx County, New York
United States Department of Justice
Hon. Leon Silverman, Former Special Prosecutor

All of the above parties have been served with copies of this petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. ____

IN RE:

SECRETARY OF LABOR
RAYMOND J. DONOVAN,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DIVISION FOR THE PURPOSE OF APPOINTING INDEPENDENT COUNSEL, ETHICS IN GOVERNMENT ACT OF 1978

OPINIONS BELOW

This petition for a writ of *certiorari* seeks review by this Court of orders of the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978 (the "Special Court")[1] that were entered without opinion. Such orders are attached hereto as appendices A through E.

1 Effective January 3, 1983 the Special Court's title and mandate were changed by, *inter alia*, substitution of the words "independent counsel" for "special prosecutor." Pub. L. 97-409, 97 Stat. 3537, 3555 (1982).

JURISDICTION

The Order of the Special Court to which this petition is addressed was entered on December 5, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal statutory provisions involved are:

28 U.S.C. § 49(f):

> *§ 49 Assignment of judges to division to appoint independent counsels*
>
> (f) Except as otherwise provided in chapter 39 of this title, no member of such division of the court who participated in a function conferred on the division under chapter 39 of this title involving a[n] independent counsel shall be eligible to participate in any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office or which involves the exercise of such independent counsel's official duties, regardless of whether such independent counsel is still serving in that office.

The Ethics in Government Act, 28 U.S.C. § 595(b)(3):

> *§ 595 Reporting and Congressional Oversight*
>
> (b)(3) The division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a

report under this section available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of such division be included as an appendix to such report.

and Rule 6(e)(3) of the Federal Rules of Criminal Procedure:

Rule 6. The Grand Jury

(e) Recording and Disclosure of Proceedings.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(iii) when the disclosure is made by an attorney for the government to another federal grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is *ex parte*, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

STATEMENT OF THE CASE

United States Secretary of Labor Raymond J. Donovan ("Secretary Donovan") moved before the Special Court[2] for an order vacating prior *ex parte* orders of that Court entered on November 12, 1982 (A3-5)[3], February 27, 1984 (A7-12), July 30, 1984 (A13-15), and August 17, 1984 (A17) (the "disclosure orders"), which permitted disclosure to the District Attorney of Bronx County, New York of materials constituting matters occurring before a federal grand jury.

The grounds for such motion were that the disclosure orders were granted in violation of 28 U.S.C. §§ 593, 595, and in violation of Rule 6(e) of the Federal Rules of Criminal Procedure in that the Special Court had no jurisdiction to order disclosure of grand jury materials that were not part of Special Prosecutor Silverman's report, that the applications for such orders were made *ex parte*, without proper notice to Secretary Donovan or other interested individuals, and that the Bronx District Attorney failed adequately to demonstrate compelling necessity or particularized need for disclosure of the grand jury materials.

This petition seeks review of the Special Court's denial of Secretary Donovan's motion.

On September 24, 1984, a Bronx County, New York grand jury returned a 137-count indictment against Secretary Donovan and 11 other defendants (the "Bronx indictment"). In the course of that grand jury investigation, the Bronx County District Attorney's office obtained access to the files and records of Special Prosecutor Silverman, including exten-

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2 Secretary Donovan was the subject of an investigation by Special Prosecutor Leon Silverman, who was appointed by the Special Court on December 29, 1981. In connection with this investigation, a grand jury was empanelled on February 1, 1982 in the Eastern District of New York. The Special Prosecutor concluded that there was no credible evidence to support any allegation against Secretary Donovan.

3 References (A____) are to the appendix herein.

sive testimony before the federal grand jury empanelled in the Eastern District of New York. (Curran Aff. at ¶¶ 18-20)[4] (A23)

The Bronx County District Attorney's office obtained such access through four applications made under oath to the Special Court. Secretary Donovan, the other defendants, and their respective counsel received no notice and had no knowledge of these applications or of the ensuing orders until on or after August 29, 1984. (Curran Aff. at ¶ 14) (A22) The Bronx indictment, as well as the voluntary disclosure forms accompanying it, indicated that the Bronx grand jury placed substantial reliance upon the federal grand jury materials obtained pursuant to the Special Court's orders.[5] (Curran Aff. at ¶ 18) (A23)

In a motion filed with the Special Court on October 22, 1984 Secretary Donovan sought to obtain the moving papers filed by the Bronx County District Attorney and the Special Court's orders granting or denying such motions. (Curran Aff. at ¶ 19) (A23)

In an order entered on November 19, 1984 the Special Court granted such motion, ordering production to Secretary Donovan of copies "of all moving papers filed by the Bronx County District Attorney's office in support of its applications for access to the files and records of Special Prosecutor Leon Silverman and of the orders of this Division entered upon such applications."

On November 21, 1984 former Special Prosecutor Silverman, pursuant to the Special Court's order of November 19,

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4 References are to the affidavit of Paul J. Curran, dated November 26, 1984, attached hereto as appendix F (A19-27).

5 Subsequently, the record of the Bronx grand jury was ordered disclosed to the defendants, and that record revealed that numerous excerpts from the record of the federal grand jury had been read by the prosecutors to the Bronx grand jury. Such disclosure was made subsequent to the Special Court's order of December 5, 1984 and, consequently, is not part of the record herein. The record of the Bronx grand jury reflects highly selective and prejudicial use of the federal grand jury materials.

produced to Secretary Donovan's lawyers copies of the four orders and underlying applications for the disclosure sought by the Bronx District Attorney of "investigatory records procured or generated during the investigation by the special prosecutor herein which are now in the custody of the Court." (A3) Upon their face, such orders plainly call for production of the grand jury testimony of numerous witnesses. In some cases, the orders call for excerpts from grand jury testimony; in other cases, they call for the production of the *entire* grand jury testimony of certain witnesses. *See, e.g.*, Order of November 12, 1982, items 4-11 (A4), Order of February 27, 1984, items 3, 4, 6, 7-9, 11, 13. (A7-8)

On November 28, 1984, Secretary Donovan moved in the Special Court for an order vacating the disclosure orders and requiring return of all such grand jury materials to the Clerk of the Special Court. Secretary Donovan's motion was denied by the Special Court, without opinion, in an order entered on December 5, 1984. (A1)

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE APPARENT CONFLICT BETWEEN RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE ETHICS IN GOVERNMENT ACT

PRELIMINARY STATEMENT

As will be set forth more fully below, this case arises from an apparent conflict between the requirements of Rule 6(e) of the Federal Rules of Criminal Procedure regarding grand jury secrecy and certain provisions of the Ethics in Government Act, contained in 28 U.S.C. § 595(b)(3), which permit the Special Court to release "to any appropriate person" "portions" of a Special Prosecutor's confidential report to the Special Court.

While Rule 6(e) and the holdings of this and other courts construing it require that a person wishing to obtain grand jury transcripts and other materials make certain showings, including that such materials are sought to prevent an injustice preliminarily to or in connection with a judicial proceeding and that the applicant has a compelling necessity or particularized need for the disclosure of such materials, the Ethics in Government Act contains no such safeguards. To the extent, therefore, that grand jury materials are "portions" of the Special Prosecutor's report, it is necessary for this Court to grant *certiorari* in order to assure that all federal courts, including the Special Court, apply the same standards to a request for disclosure of grand jury materials.

More importantly, the present case arises in large part from *ex parte* disclosure by the Special Court of grand jury materials that were *not*, in fact, *portions* of the Special Prosecutor's report for, they were neither contained in nor made a part of the report. As will be demonstrated more fully below, such disclosures exceeded the jurisdiction of the Special Court. The grand jury whose record is at issue here was empanelled by the United States District Court for the Eastern District of New York, and it is that Court before which the Bronx District Attorney was obliged to make his application for disclosure of grand jury materials.

It is necessary, then, for this Court to grant *certiorari* in order that it may decide, for the first time, two critically important issues: First, whether the Special Court has jurisdiction to order, *ex parte*, disclosure of grand jury materials that are not portions of a Special Prosecutor's report, irrespective of the showing made by the applicant; and, second, whether the Special Court erred in not requiring a showing of compelling necessity or particularized need with regard to disclosure of federal grand jury materials.

It would appear that investigations by Special Prosecutors or Independent Counsel have become a permanent part of the operation of the federal government. Moreover, the decisions

of the Special Court, since it is a division of the District of Columbia Circuit, are apparently reviewable *only* by this Court. It is important, then, that this Court grant *certiorari* so that it may provide guidance to the Special Court and so that the lack of jurisdiction of the Special Court to act on matters not specifically addressed in Chapter 39 of Title 28 can be made clear.

POINT I

THE SPECIAL COURT LACKED JURISDICTION TO ORDER DISCLOSURE OF MATTERS OCCURRING BEFORE A FEDERAL GRAND JURY

The Special Court was created by and exists pursuant to 28 U.S.C. § 49. That statute expressly provides that no member of the Special Court shall be eligible to participate in a judicial proceeding concerning any matter relating to a Special Prosecutor or an investigation with respect to which that member has functioned, except for matters specifically set forth in Chapter 39 of Title 28. 28 U.S.C. § 49(f)(1982). Thus, if the Special Court or its individual members are to hear and pass upon applications such as the one made by the Bronx District Attorney, express authority to do so must be found in Chapter 39, or not at all.

The only arguably applicable provision in Chapter 39 is 28 U.S.C. § 595(b)(3), which is specifically directed to *portions* of the Special Prosecutor's confidential *report* to the Special Court. It therefore follows that the Special Court has, as a practical matter, jurisdiction to disclose *only* such portions of that report as are not published in the public version. The Special Court, then, by the plain meaning of the statute, has no jurisdiction over grand jury materials created by the Special Prosecutor during his investigation, but not included in the confidential report.

The only authoritative source for determining which materials are portions of the confidential report and which are not

is the unredacted report itself, to which Secretary Donovan has not had full access. The disclosed grand jury materials, however, far exceeded those that have been made part of the report.[6] (Curran Aff. at ¶ 22) (A24)

As demonstrated above, the Special Court has jurisdiction only over portions of the Special Prosecutor's report and has no jurisdiction over grand jury materials that were not included in and made a part of such report. Moreover, it is plain from Rule 6(e)(3)(D) that an application for access to grand jury materials (the requirements of which will be discussed in detail in Point II below), *must* be filed in the district where the grand jury in question was convened. Since the grand jury materials in question were obtained from a grand jury in the Eastern District of New York, it is plain that, pursuant to Rule 6(e)(3)(D), only the United States District Court for the Eastern District of New York has jurisdiction to hear an initial application for disclosure of these grand jury materials.

For the reasons stated above, the Special Court was without authority to order disclosure of matters occurring before a grand jury convened in the Eastern District of New York, except to the extent that such materials were specifically made part of the Special Prosecutor's report. Consequently, the orders granting disclosure of grand jury materials were due to be vacated, and a writ of *certiorari* should be granted to review and reverse the Special Court's denial of Secretary Donovan's motion.

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6 This was confirmed to counsel by Special Prosecutor Silverman.

POINT II

THE BRONX DISTRICT ATTORNEY'S APPLICATIONS AND THE SUBSEQUENT DISCLOSURES VIOLATED RULE 6(e)

A. The Bronx District Attorney's Applications Were Procedurally Defective Under Rule 6(e)

It is the general rule that matters occurring before a grand jury are to remain secret. Fed. R. Crim. P. 6(e)(2). This Court has consistently held that the proper functioning of the grand jury system depends upon adherence to this general rule of secrecy. *See, e.g., United States* v. *Sells Engineering, Inc.*, ___ U.S. ___, 103 S. Ct. 3133, 3137-38 (1983);[7] *Douglas Oil Company* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979); *United States* v. *Procter & Gamble Company*, 356 U.S. 677, 681-82 & n.6 (1958). One important purpose of this policy of secrecy is the protection of the innocent. *United States* v. *Procter & Gamble Company*, 356 U.S. at 681-682 n.6 (quoting *United States* v. *Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)). In the present case, Secretary Donovan has been investigated thoroughly and the Special Prosecutor has found insufficient evidence to indict. Thus, it is clear that Secretary Donovan and the other witnesses before the federal grand jury are fully

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7 Sells was a case, like this one, that arose after the disclosures were made. There, the government argued that the matter was moot because of the prior disclosure. The Court of Appeals, however, held in language quoted approvingly by this Court:

> The controversy here is still a live one. By its terms the disclosure order grants access to all attorneys for the Civil Division, their paralegal and secretarial staff, and all other necessary assistants. Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but *we can grant partial relief by preventing further disclosure.*

United States v. Sells Engineering, Inc., 103 S. Ct. at 3137 n.6 (quoting In re Grand Jury Investigation, No. 78-184 (Sells, Inc.), 642 F.2d 1184, 1187-88 (9th Cir. 1981)) (emphasis added).

entitled to all the protections afforded by the policy of grand jury secrecy.[8]

In order to assure that matters occurring before a grand jury are not lightly disclosed, the only possible grounds for disclosure of such matters are those set forth in Rule 6(e)(3)(C).[9] *United States* v. *Sells Engineering*, 103 S.Ct. at 3137. Since the Bronx District Attorney was not presenting his case to another *federal* grand jury and since the disclosure was plainly not sought by a defendant, the only applicable ground for disclosure is Rule 6(e)(3)(C)(i), which provides for disclosure

> "when so directed by a court preliminarily to or in connection with a judicial proceeding."

The procedural requirements for a petition for disclosure pursuant to Rule 6(e)(3)(C)(i) are set forth in Rule 6(e)(3)(D), which provides that,

> "A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is *ex parte*, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard."

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8 This is particularly true where, as here, the Bronx County charges against Secretary Donovan and others are predicated upon the same facts that Special Prosecutor Silverman investigated thoroughly and found constituted no basis to indict anyone.

9 A recent amendment to Rule 6(e)(3)(C), passed as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 215, 98 Stat. 1837, 2016-17 (1984), specifically addresses disclosures to local prosecutors, beginning January 1, 1986. The passage of this amendment demonstrates that, until its effective date, state prosecutors are bound by the current requirements of Rule 6(e)(3)(C). *Cf.* Illinois v. Abbott & Associates, Inc., 460 U.S. 557, 572-73 (1983); In re Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24, 36 (2d Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983).

This portion of the Rule was recently added for the express purpose of requiring all applicants for access to grand jury materials (other than, in some circumstances, the federal government) to proceed on notice to all potentially interested parties. *See* Notes of Advisory Committee on Rules, 1983 Amendment. The intent of this amendment is clear:

> "The second sentence requires the petitioner to serve notice of his petition upon several persons who, by the third sentence, are recognized as entitled to appear and be heard on the matter. The notice requirement ensures that all interested parties, if they wish, may make a timely appearance. Absent such notice, these persons, who then might only learn of the order made in response to the motion after it was entered, have had to resort to the cumbersome and inefficient procedure of a motion to vacate the order." Notes of Advisory Committee on Rules, 1983 Amendment.

This 1983 amendment was, in effect, an enactment of a judicially created "preference for adversariness over *ex parte*-ness whenever that can be reasonably achieved." *In re Grand Jury Matter*, 495 F. Supp. 127, 134 (E.D. Pa. 1980). *See also In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184, 1192 (9th Cir. 1981), *aff'd sub nom., United States v. Sells Engineering, Inc.*, ____ U.S. ____, 103 S. Ct. 3133 (1983); *Illinois v. Sarbaugh*, 552 F.2d 768, 773 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977); *In re Doe*, 537 F. Supp. 1038, 1041-42 (D.R.I. 1982). Moreover, without expressly addressing the question of the propriety of an *ex parte* application, this Court has, at least by inference, disapproved it. *Douglas Oil Company*, 441 U.S. at 218 n.8.

Thus, even assuming, *arguendo*, that the Bronx grand jury investigation was a "judicial proceeding" within the meaning of the rule[10] it was patently improper for any court, even the

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10 None of the Bronx County District Attorney's applications to the Special Court make any showing whatsoever to meet this threshold requirement. Indeed, Secretary Donovan is not even mentioned in these applications. Thus, it is plain that, at least with respect to Secretary Donovan, the applications did not pass muster on this basis alone.

one that has jurisdiction over the grand jury materials, to entertain a petition for disclosure unless notice was given to Secretary Donovan, who was the object of the Special Prosecutor's investigation and who was also a target of the Bronx grand jury, which indicted him on September 24, 1984.

B. The Bronx District Attorney Failed to Make a Sufficient Showing of Necessity to Warrant Disclosure of Grand Jury Materials

In a case where a party seeks disclosure of matters occurring before a grand jury, *that party* bears the burden of demonstrating that such disclosure is both proper and necessary. *Douglas Oil Company* v. *Petrol Stops Northwest*, 441 U.S. at 222:

> "From *Procter & Gamble* and *Dennis* emerges the standard for determining when the traditional secrecy of the grand jury may be broken: Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." (footnote omitted).

This requirement has also been described as imposing upon the moving party the burden of showing "compelling necessity" or "particularized need" for the grand jury materials he seeks. *United States v. Procter & Gamble Company*, 356 U.S. at 683.

In order to demonstrate such compelling necessity or particularized need, the party seeking grand jury materials must show that the grand jury materials sought are needed for very specific purposes, and that such needs cannot otherwise be met:

> "Merely showing that the testimony contained in the transcript is relevant and useful in a civil action does not appear sufficient to counter the public policy of secrecy of Grand Jury proceedings. The Legislative History, citing

> *United States* v. *Procter & Gamble*, *supra*, and *Robert Hawthorne, Inc. v. Director of Internal Revenue Service*, 406 F. Supp. 1098 (E.D. Pa. 1976), reflects the standards necessary for the lifting of the secrecy of Grand Jury proceedings and in those cases of particularized need, the secrecy of the Grand Jury proceedings is lifted by disclosure *in a discreet and limited manner.*" *In re Grand Jury, September 20, 21, 22, and 25, 1967*, 82 F.R.D. 70, 73 (N.D. W. Va. 1979). (emphasis added).

Where, as in the present case, the movant requested disclosure of *entire* grand jury transcripts of numerous individuals and provided the Special Court with virtually no details about the investigation that the Bronx grand jury was conducting, this test is plainly not met. The Special Court was never given sufficient information to make the discreet and limited disclosure of grand jury materials required in order to carefully tailor the disclosure to the purpose for which it is requested. *See In re June 20, 1977 Concurrent Grand Jury Investigation (J. Ray McDermott & Company)*, 622 F.2d 166, 172 (5th Cir. 1980).

Indeed, even in the last application filed with the Special Court, the Bronx District Attorney stated, under oath, only that the materials were sought in connection with an investigation of the murder of Salvatore Frascone. (Affidavit of Stephen R. Bookin, August 10, 1984) This affidavit was sworn to a mere 19 days *before* Secretary Donovan's counsel was first told of the Bronx County grand jury investigation and 10 days *after* Messrs. Bookin and Merola swore to the District Court for the Southern District of New York that their grand jury investigation involved Secretary Donovan's former employer, Schiavone Construction Company, and certain of its officers. (Curran Aff. at ¶¶ 26, 27) (A25-26) Thus, it would appear that the Bronx District Attorney affirmatively misled the Special Court as to the nature of the "judicial proceeding" in connection with which disclosure of grand jury materials was sought. Even if the Bronx District Attorney's disclosure applications

were facially sufficient, which they were not, the Special Court should have, upon Secretary Donovan's motion, vacated its prior orders in light of this apparent misrepresentation.

Disclosure must be denied when the "judicial proceeding" in connection with which disclosure is sought is speculative or remote because the mandatory analysis of particularized need "cannot even be made without consideration of the particulars of the judicial proceeding with respect to which disclosure is sought." *United States* v. *Baggot*, ____ U.S. ____, 103 S. Ct. 3164, 3167 n.4 (1983) (citations omitted). *A fortiori*, the analysis cannot and could not be made correctly when the judicial proceeding was misrepresented to the Special Court. Thus, it is plain that the Bronx District Attorney's application was insufficient as a matter of law and that the Special Court—even if it had jurisdiction—failed both initially and upon Secretary Donovan's motion properly to balance the need for grand jury secrecy against the need for disclosure.

The court determining a motion for disclosure must also inform itself fully as to the *use* the applicant seeks to make of the grand jury materials, not only so that it may determine whether there is particularized need but also in order to limit, to the greatest extent possible, the scope of the disclosure. This process generally requires that the requested grand jury materials be unavailable to the applicant by any other means. *See, e.g., In re Grand Jury Investigation*, 414 F. Supp. 74 (S.D.N.Y. 1976).

For example, in *United States* v. *Sobotka*, 623 F.2d 764 (2d Cir. 1980), the Second Circuit reversed an order of the district court disclosing grand jury testimony to the Grievance Committee of the Windham County [Connecticut] Judicial District. The Court of Appeals found that there had been no showing of particularized need both because the Committee was not sufficiently specific about the information sought and, more significantly in the context of the present case, because the committee had "subpoena powers and can compel testimony in relation to

any matter deemed by the Committee to be relevant to its inquiry or investigation." *Id.* at 768.

In the present case, the Bronx District Attorney chose to use federal grand jury testimony rather than to subpoena certain witnesses. This is not only improper under Rule 6(e), but also under New York law, which says that a prosecutor may not introduce prior sworn testimony into the record of a grand jury unless he has first made reasonably diligent efforts to secure the attendance of the witness. N.Y. Crim. Proc. Law §§ 670.10, 670.20 (McKinney 1984). No such efforts were ever made.

In sum, the requisite showing of compelling necessity or particularized need was never made and, indeed, it could never have been made. The Special Court, however, apparently applied the wrong standard—if it applied any standard at all—and ordered disclosure of federal grand jury records in utter disregard of Rule 6(e). This error, standing alone, compels this Court to grant *certiorari* so that the orders of the Special Court may be reversed.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted.

Dated: March 5, 1985

Respectfully submitted,

William O. Bittman
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsel
Ethics in Government Act of 1978

In Re: Secretary of Labor
Raymond J. Donovan

September Term 1984
No. 81-2

Before: Robb, *Senior Circuit Judge,* Presiding, Morgan, *Senior Circuit Judge* and Mansfield*, *Senior Circuit Judge*

ORDER

Upon consideration of the motion filed by Secretary Donovan requesting this court to vacate its various orders authorizing the disclosure of specified documents and materials to the Bronx County District Attorney and to require the latter to return same to this Division, and of the record herein and the various pleadings and communications submitted with respect to the disclosure of materials, it is

ORDERED, by the Court, that Secretary Donovan's motion to vacate the Division's various orders authorizing disclosure of documents is denied.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher, *Clerk*

DATED: Washington, D.C.

* Senior Circuit Judge Mansfield did not participate in the foregoing order.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Special Prosecutors
Ethics in Government Act of 1978

In Re: Secretary of Labor
Raymond J. Donovan No. 81-2

Before: Robb, *Senior Circuit Judge*, Presiding, Lumbard, *Senior Circuit Judge*, and Morgan, *Senior Circuit Judge*

ORDER

Upon consideration of the application of James F. Shalleck, Esquire, Assistant District Attorney, Bronx County, New York, filed herein November 5, 1982, it is by the Court

ORDERED, pursuant to 28 U.S.C. §592(d)(1), that disclosure may be made to James F. Shalleck, Assistant District Attorney, of investigatory records procured or generated during the investigation by the Special Prosecutor herein which are now in the custody of the Court, as follows:

1. Tape recordings and transcripts, if any, of the four telephone conversations of May 12, 14, 17 and 19, 1982, between Nat Masselli and Morris J. Levin referred to at p. 564 of volume 2 of the redacted version of the Report of the Special Prosecutor (the "Report");

2. Excerpts from Morris J. Levin's grand jury testimony, if any, relating to: (a) the telephone conversations referred to in item 1, *supra*; (b) a meeting with William Masselli in December 1981; (c) Philip Buono; and (d) Joseph Verlezza;

3. Excerpts from William Masselli's grand jury testimony, if any, relating to: (a) a meeting with Morris Levin in December 1981; (b) Philip Buono; (c) Joseph Verlezza; and (d) Exhibit 62 to the Report (the "Di Carolis paper" referred to, among other places, at p. 508 of volume 2 of the Report);

4. Philip Buono's grand jury testimony;

5. Joseph Verlezza's grand jury testimony;

6. Nat Masselli's grand jury testimony, if any;

7. Excerpts from the grand jury testimony of Robert DeFilippis, if any, relating to: (a) William Masselli; (b) Nat Masselli; (c) Jopel; (d) Joseph Galiber; (e) Philip Buono; and (f) Joseph Verlezza;

8. Excerpts from Joseph DiCarolis' grand jury testimony, if any, relating to: (a) William Masselli; (b) Jopel; and (c) the DiCarolis paper;

9. Excerpts from Ronald Schiavone's grand jury testimony, if any, relating to: (a) William Masselli; (b) Jopel; (c) Philip Buono; and (d) Joseph Verlezza;

10. Joseph Galiber's grand jury testimony;

11. Excerpts from the grand jury testimony of Albert Magrini, if any, relating to: (a) William Masselli; (b) Jopel; (c) Philip Buono; and (d) Joseph Verlezza;

12. Ledger sheets reflecting Schiavone Construction Company advances to, and repayment by, Jopel, including S.P. nos. 352066-7 and 352122-40;

13. Excerpts from the testimony of Raymond J. Donovan relating to: (a) William Masselli; (b) Jopel; (c) Philip Buono; and (d) Joseph Verlezza;

14. Excerpts from the testimony of Gennaro Liguori relating to: (a) William Masselli; (b) Jopel; (c) Philip Buono; and (d) Joseph Verlezza; and it is

FURTHER ORDERED that James F. Shalleck, Assistant District Attorney, shall make no disclosure of the contents of these records except to members of a duly constituted grand jury in Bronx County, New York, and such government personnel as are deemed necessary by the Bronx County District Attorney in the investigation of this matter, the presentation of evidence before a grand jury, and the enforcement of the criminal laws of New York State.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER

George A. Fisher, *Clerk*

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsel
Ethics in Government Act of 1978

In Re: Secretary of Labor
Raymond J. Donovan

September Term 1981
No. 81-2

Before: Robb, *Senior Circuit Judge,* Presiding, Lumbard, *Senior Circuit Judge* and Morgan, *Senior Circuit Judge*

ORDER

Upon the application of Stephen R. Bookin, Assistant District Attorney, Bronx County, New York, and for good cause shown, it is

ORDERED, by the Court, that Leon Silverman, former Special Prosecutor in the captioned proceeding be, and he is hereby, authorized to furnish to the District Attorney of Bronx County, New York, access to the following investigatory records procured or generated during his investigation:

1. The unredacted interview of Louis R. Nargi by agents of the FBI on February 9, 1980 and February 12, 1980, nine pages, referred to in the Report of the Special Prosecutor (the *Report*) as Exhibit 64 and referred to at pp. 534-537.

2. The interview of Louis R. Nargi by agents of the Special Prosecutor on February 24, 1982, referred to in the *Report* at pp. 93-94, 537 ftnt. 402 "[MATERIAL DELETED.]", 538-540.

3. The grand jury testimony (Immunized) by Louis R. Nargi on March 10, 1982, referred to in the *Report* at pp. 94-95, 540 "[*Grand Jury Material Deleted.*]."

4. The initial grand jury testimony by William P. Masselli referred to in the *Report* at p. 507 "[*GRAND JURY MATERIAL DELETED.*]."

5. The interview of William P. Masselli by agents of the Special Prosecutor on May 17, 1982, referred to in the *Report* at pp. 507-511.

6. The follow-up grand jury testimony (Immunized) by William P. Masselli referred to in the *Report* at pp. 91, 229, 511, 674 "[*GRAND JURY MATERIAL DELETED.*]."

7. Any grand jury testimony by William P. Masselli or interviews of him by agents of the Special Prosecutor relating to May 20, 1977 lunch with Joseph DiCarolis and Gennaro Liguori, referred to in the *Report* in Exhibit 83.

8. Any grand jury testimony by William P. Masselli or interviews of him by agents of the Special Prosecutor relating to June 21, 1977 lunch with Joseph DiCarolis at Prudenti's, referred to in the *Report* in Exhibit 83.

9. The grand jury testimony by Joseph Bugliarelli referred to in the *Report* at p. 508 ftnt. 392 "[*GRAND JURY MATERIAL DELETED.*]."

10. The interview of Albert J. Magrini by agents of the Special Prosecutor on February 26, 1982, referred to in the *Report* at pp. 540-541.

11. The grand jury testimony by Albert J. Magrini referred to in the *Report* at p. 541 "[*GRAND JURY MATERIAL DELETED.*]."

12. The interview of Joseph A. DiCarolis by agents of the Special Prosecutor on January 15, 1982, referred to in the *Report* at pp. 130-131, 153, 542-548.

13. The grand jury testimony by Joseph A. DiCarolis referred to in the *Report* at pp. 60, 131, 387, 473,

548, 572, 598, 662 "[*GRAND JURY MATERIAL DELETED.*]."

14. Any grand jury testimony by Joseph A. DiCarolis or interviews of him by agents of the Special Prosecutor relating to May 20, 1977 lunch with William Masselli and Gennaro Liguori, referred to in the *Report* in Exhibit 83.

15. Any grand jury testimony by Joseph A. DiCarolis or interviews of him by agents of the Special Prosecutor relating to June 21, 1977 lunch at Prudenti's with Jopel owners, referred to in the *Report* in Exhibit 83 and at p. 148.

16. The interview of Morris J. Levin by agents of the Special Prosecutor on January 27, 1982, referred to in the *Report* at pp. 551-554.

17. The grand jury testimony by Morris J. Levin referred to in the *Report* at p. 554 "[*GRAND JURY MATERIAL DELETED.*]."

18. The interview of Robert DeFilippis by agents of the Special Prosecutor on April 2, 1982, referred to in the *Report* at pp. 671-672.

19. The grand jury testimony by Robert DeFilippis referred to in the *Report* at p. 558 "[*GRAND JURY MATERIAL DELETED.*]."

20. The interview of Vincent Marino by agents of the Special Prosecutor on May 11, 1982, referred to in the *Report* at p. 559.

21. The grand jury testimony by Vincent Marino referred to in the *Report* at pp. 559, 595 "[*GRAND JURY MATERIAL DELETED.*]."

22. The interview of Edward Garofola by agents of the Special Prosecutor on May 19, 1982, referred to in the *Report* at pp. 559-560.

23. The grand jury testimony by Edward Garofola referred to in the *Report* at p. 560 "[*GRAND JURY MATERIAL DELETED.*]."

24. The interview of Joseph Galiber by agents of the Special Prosecutor on June 4, 1982, referred to in the *Report* at p. 560-561.

25. The grand jury testimony by Joseph Galiber referred to in the *Report* at p. 561 "[*GRAND JURY MATERIAL DELETED.*]."

26. The grand jury testimony (Immunized) by Philip Buono referred to in the *Report* at pp. 561, 592, "[*GRAND JURY MATERIAL DELETED.*]."

27. The interview of Gennaro Liguori by agents of the Special Prosecutor on June 3, 1982, referred to in the *Report* at pp. 561-562.

28. Any grand jury testimony by Gennaro Liguori or interviews of him by agents of the Special Prosecutor relating to May 20, 1977 lunch with William Masselli and Joseph DiCarolis referred to in the *Report* in Exhibit 83.

29. The interview of Raymond Donovan by agents of the Special Prosecutor on January 18, 1982, referred to in the *Report* at pp. 566-568.

30. The interview of Raymond Donovan by agents of the Special Prosecutor on May 28, 1982, referred to in the *Report* at pp. 497, 593, 594, 595, 596.

31. The grand jury testimony by Raymond Donovan referred to in the *Report* at pp. 568, 593, 594, 595, 597 "[*GRAND JURY MATERIAL DELETED.*]."

32. Any grand jury testimony by Raymond Donovan or interviews of him by agents of the Special Prosecutor relating to discussions he had with Joseph DiCarolis about DiCarolis' lunch at Prudenti's with Jopel

owners on June 21, 1977, referred to in the *Report* in Exhibit 83 and at p. 148.

33. Any grand jury testimony by Ronald Schiavone or interviews of him by agents of the Special Prosecutor relating to discussions he had with Joseph DiCarolis about DiCarolis' lunch at Prudenti's with Jopel owners on June 21, 1977, referred to in the *Report* in Exhibit 83 and at p. 148.

34. The interview of Mario Montuoro by agents of the Special Prosecutor on January 8, 1982, referred to in the *Report* at pp. 219 ftnt. 158 *et seq.*, 220, 221.

35. The information from detectives assigned to the Bronx District Attorney's Office to the Department of Labor concerning Mario Montuoro, referred to in the *Report* as S.P. no. 150270 and referred to at p. 222 ftnt. 171.

36. The contents of allegations by a journalist on July 21, 1982, concerning Alfred DiTraglia, referred to in the Supplemental Report of the Special Prosecutor (*Supplemental Report*) at pp. 28-29 "[*MATERIAL DELETED.*]."

37. The grand jury testimony (Immunized) by Alfred DiTraglia referred to in the *Supplemental Report* at p. 31 "[*GRAND JURY MATERIAL DELETED.*]."

38. The interview of Louise Friscia by agents of the Special Prosecutor on August 12, 1982, referred to in the *Supplemental Report* at pp. 31-33.

39. The grand jury testimony by Joseph Verlezza on September 3, 1982.

It is FURTHER ORDERED, by the Court, that Leon Silverman, the former Special Prosecutor, be authorized to furnish to the District Attorney of Bronx County, New York, copies of any or all of the above enumerated investigatory records

procured or generated during his investigation that the District Attorney of Bronx County, New York, deems necessary.

It is FURTHER ORDERED, by the Court, that the District Attorney of Bronx County, New York, shall not make any disclosure of the contents of these records except to a duly constituted grand jury in Bronx County, New York, and such government personnel as are deemed necessary by the District Attorney of Bronx County in the performance of his duty to investigate and present evidence before a grand jury and to enforce the laws of the State of New York.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER

George A. Fisher, *Clerk*

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Special Prosecutors
Ethics in Government Act of 1978

In Re: Secretary of Labor
Raymond J. Donovan

September Term 1981
No. 81-2

ORDER

Upon the application of Stephen R. Bookin, Assistant District Attorney, Bronx County, New York,

It is hereby ORDERED that Leon Silverman, the former Special Prosecutor, be authorized to furnish to the District Attorney of Bronx County, New York, copies of the following investigatory records procured or generated during his investigation:

1. Grand jury proceedings on April 23, 1982 contained on pages 3869, 3879-3883, 3890-3901, 3903-3924, 3929-3932 of the official transcript (William Masselli).

2. Grand jury proceedings on February 4, 1982 contained on pages 582-608, 678-679, 681-682 of the official transcript (Joseph DiCarolis).

3. Grand jury exhibits 29, 30, 31, 32, 33, 34, 35, 36, and 37 referred to before the grand jury on February 4, 1982 and noted on pages 621, 625, 628, 629, 630, 631, 632 of the official transcript (Joseph DiCarolis).

4. Grand jury proceedings on May 20, 1982 contained on pages 5379-5391 of the official transcript (Jack Napoli).

5. Grand jury proceedings on May 20, 1982 contained on pages 5578-5579 of the official transcript (Morris Levin).

6. Grand jury proceedings on February 3, 1982 contained on pages 438-445 of the official transcript (Mario Montuoro).

7. Grand jury proceedings on February 3, 1982 contained on pages 475-491, 523-524, 535-539 of the official transcript (Ronald Schiavone).

8. Grand jury proceedings on May 11, 1982 contained on pages 4816-4817, 4846, 4937-4942, 4967-4969 of the official transcript (Raymond Donovan).

9. Grand jury proceedings on May 28, 1982 contained on pages 6151-6163, 6167-6169 of the official transcript (Raymond Donovan).

10. Interview of Raymond Donovan by agents of the Special Prosecutor on May 10, 1982.

11. Grand jury proceedings on February 17, 1982 contained on pages 1698-1701 of the official transcript (Gennaro Liguori).

12. Grand jury proceedings on March 4, 1982 contained on pages 2525, 2664-2669 of the official transcript (Carter).

13. Grand jury proceedings on March 10, 1982 contained on pages 2895, 2927-2928, 2931-2935 of the official transcript (Louis Nargi).

14. Grand jury proceedings on May 5, 1982 contained on pages 4538, 4541-4542 of the official transcript (Ronald Schiavone).

15. Grand jury proceedings on June 3, 1982 contained on pages 6381-6426 of the official transcript (Louis Sanzo).

16. Grand jury proceedings on May 13, 1982 contained on pages 5055-5060 of the official transcript (Vincent Marino).

It is further ORDERED that the District Attorney of Bronx County, New York, shall not make any disclosure of the contents of these records except to a duly constituted grand jury in Bronx County, New York, and such government personnel are deemed necessary by the District Attorney of Bronx County in the performance of his duty to investigate and present evidence before a grand jury and to enforce the laws of the State of New York.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER

George A. Fisher, *Clerk*

DATED: Washington, D.C.
July 30, 1984

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Special Prosecutors
Ethics in Government Act of 1978

In Re: Secretary of Labor
Raymond J. Donovan

September Term 1981
No. 81-2

ORDER

Upon the application of Stephen R. Bookin, Assistant District Attorney, Bronx County, New York,

It is hereby ORDERED that Leon Silverman, the former Special Prosecutor, be authorized to furnish to the District Attorney of Bronx County, New York, copies of the following investigatory records procured or generated during his investigation:

1. Grand jury exhibit 120, consisting of 63 pages, each entitled "Sub-contractor's estimate", dated June 6, 1979 through April 30, 1982.

It is further ORDERED that the District Attorney of Bronx County, New York, shall not make any disclosure of the contents of these records except to a duly constituted grand jury in Bronx County, New York, and such government personnel as are deemed necessary by the District Attorney of Bronx County in the performance of his duty to investigate and present evidence before a grand jury and to enforce the laws of the State of New York.

Per Curiam

For the Court:

DATED: Washington, D.C.
August 17, 1984

/s/ GEORGE A. FISHER
George A. Fisher, *Clerk*

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsel
Ethics in Government Act of 1978

In Re: Secretary of Labor
Raymond J. Donovan

Index No. 81-2

AFFIDAVIT

PAUL J. CURRAN, being duly sworn, deposes and states:

1. I am a member of the law firm of Kaye, Scholer, Fierman, Hays & Handler, co-counsel with Washington, D.C. law firm of Pierson, Ball & Dowd for United States Secretary of Labor Raymond J. Donovan. I am a member of the New York bar and am admitted to practice before the United States Court of Appeals for the District of Columbia Circuit.

2. I submit this affidavit in support of the instant motion of Raymond J. Donovan for an order (a) vacating four prior orders of this Court which granted applications of the Bronx County District Attorney's office for disclosure of grand jury testimony and other grand jury materials, and (b) directing the return to this Court of all the grand jury materials previously disclosed to the Bronx County District Attorney. The grounds for this motion are that this Court had no jurisdiction to issue such orders, and that the four applications were made and the four orders were entered in gross violation of the express provisions of Rule 6(e) of the Federal Rules of Criminal Procedure, which exclusively governs release of such grand jury materials.

Background Facts

3. On January 20, 1981 President Ronald Reagan nominated Raymond J. Donovan for the position of Secretary of Labor, and on February 3, 1981, after extensive hearings on his qualifications, the United States Senate confirmed his nomination. On February 4, 1981 Mr. Donovan was sworn in as Secretary of Labor.

4. Before becoming Secretary of Labor Mr. Donovan was Executive Vice President of Schiavone Construction Company, Inc. ("SCC"). He had been employed by SCC, a New Jersey Corporation that has been engaged in the heavy construction business in New Jersey, New York, and elsewhere within the United States. After he became Secretary of Labor Mr. Donovan resigned from SCC, and since then he has had no involvement in that Company's internal business affairs.

5. SCC is sponsor and operator of a joint venture ("SIC"), which in 1975 was successful low bidder on a large construction job for the New York City Transit Authority. This joint venture began its work in March, 1976, and in March, 1978 the work was expanded, and SIC, being again low bidder, was also awarded this job. The cost of this fixed price contract was funded approximately 80 per cent by the federal government pursuant to the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. §§ 1601-1613.

6. Beginning in 1977 federal regulations required, as a condition for continued federal funding of such contracts, that grant recipients like the New York City Transit Authority, see to it that contractors take steps to use minority business enterprises in a certain per cent of their construction work. The New York City Transit Authority promulgated rules for such minority participation and the joint venture, which SCC operates, complied scrupulously with those rules governing minority business participation in the construction work. One of the several minority business enterprises with which SIC sub-contracted in 1979 for work on this job, was Jopel Construction &

Trucking Co., Inc. ("Jopel"). SIC has performed this sub-contract in full compliance with all federal laws and regulations governing its operation, and the sub-contract is legitimate in all respects.

7. On or about December 29, 1981 the United States Department of Justice, at the request of Secretary Donovan, applied to this Court for the appointment of a Special Prosecutor pursuant to the provisions of the Ethics in Government Act, 28 U.S.C. § 591, to investigate whether Secretary Donovan had violated any federal criminal laws. This Court designated Leon Silverman, Esq. as Special Prosecutor.

8. Early in 1982, Special Prosecutor Silverman began presenting evidence to a Federal Grand Jury in the Eastern District of New York. He and that Grand Jury, supported by a great number of attorneys and investigators, examined numerous allegations concerning SCC and Secretary Donovan. The Grand Jury sat for more than four months and heard the testimony of 156 witnesses. On June 25, 1982, Special Prosecutor Silverman reported that the Grand Jury had unanimously determined that it had found no basis for any federal criminal indictment of Secretary Donovan.

9. On June 28, 1982, Special Prosecutor Silverman released to the public a comprehensive report (redacted version) consisting of four volumes and approximately 1025 pages, including exhibits.

10. Secretary Donovan testified before the Grand Jury on May 11, 1982, was interviewed under oath by Special Prosecutor Silverman on August 29, 1982, and was questioned by Special Prosecutor Silverman in other informal interviews. Six other SCC officials were also interviewed by Special Prosecutor Silverman and testified before the Grand Jury.

11. One of the central focuses of Special Prosecutor Silverman's investigation was the relationship between Jopel and SIC and the extent of Secretary Donovan's association with William Masselli.

12. Special Prosecutor Silverman's inquiry explored the Section 5B Contract and the subcontract between Jopel and SIC in great detail.

13. Special Prosecutor Silverman's thorough investigation of this Jopel matter unearthed no evidence of federal crimes, and no charges against Secretary Donovan, SCC, or anyone else were brought.

14. On August 29, 1984, Stephen Bookin, Assistant District Attorney for Bronx County, New York, telephoned Secretary Donovan's counsel and invited Secretary Donovan to testify voluntarily under a waiver of immunity before a Bronx County grand jury which Mr. Bookin stated had, for over one year, been investigating three areas, the murder of one Salvatore Frascone, the formation of Jopel, and Jopel's relationship with SCC and the TA, including certain quarterly reports filed with the TA by SCC.

15. On August 31, 1984, Mr. Bookin met with William O. Bittman, one of Secretary Donovan's counsel, at Mr. Bookin's office in the Bronx.

16. Mr. Bookin refused to tell Mr. Bittman whether or not Secretary Donovan was being viewed as a witness or as a target before the grand jury. He also refused to explain meaningfully the facts under investigation or to advise Mr. Bittman which New York State penal statutes were the basis of the investigation. Mr. Bookin said that the grand jury's investigation was 99 per cent complete and that Special Prosecutor Silverman's investigation concerning Secretary Donovan and Jopel had not been thorough enough.

17. On September 24, 1984 Secretary Donovan waived immunity and testified voluntarily for more than four hours before the Bronx County grand jury. He was not questioned about any larceny or the *bona fides* of Jopel as a minority business enterprise. On the same day, just after Secretary Donovan testified, the grand jury returned a 137 count, 73-page indictment against Secretary Donovan, SCC, Jopel, seven

SCC officials or former officials, and Jopel's two principal stockholders, Joseph Galiber and Mr. Masselli. The indictment includes one count of larceny, eleven counts of filing false reports and 125 counts of falsifying business records. The indictment charges Secretary Donovan with commiting 74 felonies after he became Secretary of Labor, beginning on February 13, 1982, and continuing through September 24, 1984, the date of the indictment.

This Court's Lack of Jurisdiction and Violations of Rule 6(e) of the Federal Rules of Criminal Procedure.

18. After this indictment was filed it became apparent that the Bronx County District Attorney's office's "case" against Secretary Donovan and his co-defendants was predicated virtually *in toto* upon the thorough investigation of the very same matters which Mr. Silverman had conducted. This apparently included use in the Bronx County grand jury of federal grand jury testimony and other grand jury materials obtained during the course of Mr. Silverman's investigation. Mr. Silverman conducted his investigation in 1982 before a grand jury in the Eastern District of New York.

19. In the course of counsel's investigation into this matter I discovered that the Bronx County District Attorney's office had made applications to and obtained disclosure orders not from the Eastern District of New York as Rule 6(e) requires, but rather from this Court. Accordingly, in order to discover the full extent of these disclosures, co-counsel for Mr. Donovan moved this Court on October 22, 1984 for the record of these applications and orders, and on November 19, 1984 this Court granted that application.

20. On November 21, 1984 I received from Mr. Silverman copies of four such applications and orders:

a) November 1, 1982 application of James F. Shalleck granted by Order of November 12, 1982;

b) October 27, 1983 application of Stephen R. Bookin granted by Order of February 27, 1984;

c) July 5, 1984 application of Stephen R. Bookin granted by Order of July 30, 1984;

d) August 10, 1984 application of Stephen R. Bookin granted by Order of August 17, 1984.

21. I have reviewed these documents, and it is plain that both the applications and the orders are illegal.

22. The sole authority which this Court posseses to release any grand jury materials at all is set forth in 28 U.S.C. § 595(a)(3). That subsection authorizes this Court to release only "such portions of a report made under this subsection as the division (this Court) deems appropriate." This Court has no statutory or other authorization to order the wholesale release of grand jury testimony and the related grand jury materials, which the Bronx District Attorney sought and this Court's four orders granted. Indeed, the grand jury testimony disclosed was not a part of the Special Prosecutor Silverman's report. For this reason alone the four orders must be vacated.

23. In addition, assuming *arguendo* the application could meet the mandatory threshold tests (which, as we demonstrate both below and in our memorandum of law, it did not and could not meet), Rule 6(e)(3)(D) mandates that applications for disclosure of grand jury testimony "*shall* be filed in the district where the grand jury convened" (emphasis added). Here, the grand jury convened in the Eastern District of New York, and the Bronx District Attorney's failure to apply to that Court constitutes a clear-cut and gross violation of law.

24. Even if, however, the Bronx District Attorney had applied to the proper Court, his applications are clearly defective. For example, he made no showing whatsoever that the applications were made "preliminarily to or in connection with a judicial proceeding" that bears any resemblance to the prosecution brought against Secretary Donovan and others. Even if

such a showing had been made, the requisite showing of "compelling necessity" or "particularized need" was not even attempted.

25. Further, Rule 6(e)(3)(D), at least with respect to the three applications filed in 1984, was squarely violated by the *ex parte* nature of these applications. The rule expressly provides that such *ex parte* applications may only be made by the government, and this of course means the federal government. The Bronx County District Attorney failed to "serve written notice of the petition" upon either Secretary Donovan or, insofar as we can tell, anyone else except Mr. Silverman, who was no longer in office. Astonishingly, the Department of Justice itself received no such notice. As a consequence of this illegality, Secretary Donovan and others affected were not able even to be heard. Had such notice been given, as the law requires, Secretary Donovan could, of course, have alerted this Court in advance to all of these manifest illegalities.

26. Beyond the foregoing violations of Rule 6(e) it is also apparent that the Bronx District Attorney's office did not deal squarely and truthfully with this Court in all of its applications for disclosure. Thus, in his affidavit of August 10, 1984 in support of disclosure of a 63 page Grand Jury Exhibit (No. 120), Stephen R. Bookin swore to this Court that this grand jury material was "necessary in the conduct of the investigation into the murder of Salvatore Frascone and the motive for the murder." This sworn statement was misleading in what it said and false in what it failed to say. Indeed, its falsity is evident from the face of affidavits which Mr. Bookin and Bronx County District Attorney Merola submitted on July 31, 1984, ten days earlier, to the United States District Court for the Southern District of New York. Mr. Bookin's affidavit to the Southern District runs some 25 pages, and Mr. Merola's is 3 pages. Both were submitted in support of an application for an order to use certain communications intercepted in accordance with 18 U.S.C. § 2510 *et seq*.

27. In these July 31, 1984 affidavits Messrs. Merola and Bookin swore, *inter alia*, that they had "probable cause to believe that William P. Masselli, Joseph Galiber, Jopel Contracting and Trucking Corporation, Joseph Di Carolis, Morris Levin, Richard Callaghan, and Schiavone Construction Company committed the offenses of Grand Larceny in the Second Degree, Falsifying Business Records in the First Degree, Tampering with Public Records in the First Degree, and Offering a False Instrument for Filing in the First Degree." (Merola affidavit, pages 1-2; Bookin affidavit, page 15). None of these matters was brought to this Court's attention in Mr. Bookin's subsequent affidavit of August 10, 1984 which he filed with this Court. This deceit may well constitute a contempt of this Court, and it is additional compelling evidence of the Bronx District Attorney's offices' failure to observe lawful procedures as well as a lack of good faith in its applications to this Court.

28. I submit with this affidavit and motion a memorandum of law which further demonstrates why these four orders must be vacated and why the grand jury testimony and related grand jury materials, which are covered by these orders, must be returned by the Bronx District Attorney to this Court.

29. This affidavit and motion as well as the accompanying memorandum of law are submitted *in camera*. A copy of the motion, this affidavit, and the memorandum of law has been served upon the Bronx County District Attorney as well as upon Mr. Silverman.

30. The criminal charges filed in Bronx County against Secretary Donovan and others have been pending for almost two months, and counsel must file certain motions to dismiss against those charges by November 30, 1984. For this reason and because the interests of justice require it a prompt ruling on the instant motion by this Court is of critical importance.

Accordingly, an expedited hearing is respectfully and urgently requested.

/s/ PAUL J. CURRAN
Paul J. Curran

Sworn to before me
this 26th day of November, 1984

/s/ MARIE FERRARA
Notary Public

MARIE FERRARA
Notary Public, State of New York
No. 24-4797251
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1985

No. 84-1400

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IN THE

Supreme Court of the United States

October Term, 1984

RAYMOND J. DONOVAN,

Petitioner,

against

MARIO MEROLA, District Attorney,
Bronx County, New York, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978

RESPONDENTS' BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

Questions Presented

1. Whether the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, had the statutory authority to order the disclosure of investigatory records, including grand jury materials, procured or generated during the investigation by Special Prosecutor Leon Silverman to the District Attorney of Bronx County, New York.

2. Whether the requirements of Fed.R.Crim.P. 6(e)(3)(C)(i), 6(e)(3)(D), were satisfied by application to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, pursuant to 28 U.S.C. §§ 592(d)(2), 595(b)(3).

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S.Rep. No. 97-496, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. and Adm. News 10, 12

Statutes Involved

The Federal statutory provisions involved are:

28 U.S.C. § 592(d)(2):

> No application or any other documents, materials, or memorandums supplied to the division of the court under this chapter shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

28 U.S.C. § 593(a):

> The division of the court to which this chapter refers is the division established under section 49 of this title.

28 U.S.C. §§ 594(a)(1), 594(a)(4):

> Notwithstanding any other provision of law, a independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—
>
> (1) conducting proceedings before grand juries and other investigations;
>
> (4) reviewing all documentary evidence available from any source;

28 U.S.C. §§ 595(b)(1), 595(b)(2), 595(b)(3):

> (1) In addition to any reports made under subsection (a) of this section, and before the termination

of a independent counsel's office under section 596(b) of this title, such independent counsel shall submit to the division of the court a report under this subsection.

(2) A report under this subsection shall set forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted.

(3) The division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a report under this section available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of such division be included as an appendix to such report.

28 U.S.C. §§ 49(a), 49(c), 49(d), 49(f):

(a) Beginning with the two-year period commencing on the date of the enactment of this section, three judges or justices shall be assigned for each successive two-year period to a division of the United States Court of Appeals for the District of Columbia to be the division of the court for the purpose of appointing independent counsels.

(c) In assigning judges or justices to sit on such division of the court, priority shall be given to senior circuit judges and retired justices.

(d) The Chief Justice of the United States shall designate and assign three circuit court judges or justices, one of whom shall be a judge of the United States Court of Appeals for the District of Columbia, to such division of the court. Not more than one judge or justice or senior or retired judge or justice may be named to such division from a particular court.

(f) Except as otherwise provided in chapter 39 of this title, no member of such division of the court who participated in a function conferred on the division under chapter 39 of this title involving a independent counsel shall be eligible to participate in any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office or which involves the exercise of such independent counsel's official duties, regardless of whether such independent counsel is still serving in that office.

Rules 6(e)(3)(C)(i) and 6(e)(3)(D) of the Federal Rules of Criminal Procedure:

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

No. 84-1400

IN THE

Supreme Court of the United States

October Term, 1984

RAYMOND J. DONOVAN,

Petitioner,

against

MARIO MEROLA, District Attorney,
Bronx County, New York, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Mario Merola, District Attorney, Bronx County, New York, et al., respectfully request that the Court deny the petition for a writ of certiorari, seeking review of the order of the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, entered on December 5, 1984.

Statement of the Case

On December 29, 1981, the division of the United States Court of Appeals for the District of Columbia Circuit for the Purpose of Appointing Special Prosecutors appointed Leon Silverman, pursuant to the Ethics in Government Act of 1978, to investigate numerous allegations of violations of Federal law by Secretary of Labor Raymond J. Donovan. On June 25, 1982, Special Prosecutor Silverman filed a final report with the division of the court. The report consisted of a detailed account describing the work of the special prosecutor, the numerous allegations investigated, the contents of interviews of witnesses conducted by the Federal Bureau of Investigation in previous investigations, the contents of interviews of witnesses conducted by the Special Prosecutor's staff, the contents of documents obtained by the Special Prosecutor and the grand jury, and the contents of testimony before the grand jury. The report described the substance of the information gathered, and was supported by annotations to documents, exhibits, and grand jury minutes. On June 25, 1982, the division of the court released a redacted version of the report, consisting of approximately 1000 pages, to the public.

One of the numerous allegations investigated by Special Prosecutor Silverman involved illegal activities in the relationship between petitioner and his company, Schiavone Construction Company, and William P. Masselli, president of Jopel Contracting and Trucking Corporation, a subcontractor for Schiavone Construction Company and successor to Nargi Contracting and Trucking. In the June

25, 1982 report, the Special Prosecutor detailed the cooperation he had received from Nat Masselli, son of William P. Masselli, an incarcerated Federal prisoner. The elder Masselli had claimed that he had paid $20,000 cash as a kickback to Schiavone Construction Company officer Joseph DiCarolis in return for receiving a $200,000 interest-free loan from petitioner and DiCarolis in March 1979 to enable Masselli's company, Jopel, to finance the payroll and thereby appear to operate as a minority business enterprise subcontractor on a federally funded public works project. Masselli had also claimed that Jopel was entitled to 7½ percent of $8 million listed as "rental costs" of equipment from Schiavone Construction Company which in fact were never incurred but were attributed as payments by Schiavone Construction Company to Jopel, an alleged minority business enterprise subcontractor. The Special Prosecutor attempted to corroborate these claims by recording telephone conversations between Nat Masselli and Morris Levin, an officer of Schiavone Construction Company, during which the two discussed the kickback for the $200,000 loan, the disputed money owed to Jopel for the "rental costs," and how Masselli's father would testify before the grand jury about these matters. The details of Nat Masselli's cooperation were contained in the public version of the Special Prosecutor's report.

In July 1982, in response to new allegations of impropriety by petitioner and new evidence regarding some of the allegations already investigated, Special Prosecutor Silverman reopened his investigation. On the evening of August 25, 1982, the day before William P. Masselli was scheduled to testify before the grand jury, Nat Masselli was murdered in Bronx County, New York. Subsequent inves-

tigation by the District Attorney of Bronx County, New York, and the New York City Police Department revealed that one of the reasons Nat Masselli was murdered related to his father's scheduled appearance before the grand jury the next day and Nat Masselli's attempts to record conversations regarding the kickback for the $200,000 loan and the disputed money owed to Jopel. On September 10, 1982, Special Prosecutor Silverman filed a supplemental report with the division of the court, detailing his further investigation in the same manner as he had done in his first report. On the same date, the division of the court released a redacted version of the report to the public.

On November 12, 1982, the division of the court granted the request by the District Attorney of Bronx County, New York, with the consent of Special Prosecutor Silverman, for disclosure of particularly defined excerpts of the Special Prosecutor's unredacted reports, including investigatory records procured or generated during the investigation by the Special Prosecutor. The materials disclosed were limited to those records, referred to in the reports and in the custody of the division of the court, which related specifically to the subject of the Bronx, New York investigation, the murder of Nat Masselli, and particular individuals involved in that investigation. The materials disclosed were limited to particular documents, real evidence, and grand jury testimony. The order by the division of the court limited disclosure to particularly specified portions of the reports which related to specific subject-matters relevant to the Bronx, New York investigation, and included limited excerpts of grand jury testimony annotated in those portions of the reports. The division of the court ordered that the District Attorney make no disclosure of the contents of

these materials except to a grand jury in Bronx County, New York and other government personnel necessary to the investigation, presentation of evidence before a grand jury, and enforcement of the laws of the State of New York.

Subsequently, investigation by the District Attorney of Bronx County into the murder of Nat Masselli revealed that the September 22, 1978 unsolved murder of Salvatore Frascone in Bronx County, New York, was committed as a result of a dispute between William P. Masselli and Louis R. Nargi concerning control of a Schiavone Construction Company subcontract. Masselli's company, Jopel, had taken over Nargi's subcontract with Schiavone Construction Company, and a disagreement over the ownership of equipment, execution of the subcontract, and division of the profits, led to the murder of Frascone. The relationship between Schiavone Construction Company, Jopel Contracting and Trucking Corporation, and Nargi Contracting and Trucking, had been explored by the Special Prosecutor and had been detailed in the two reports filed with the division of the court. The District Attorney of Bronx County, New York, realizing that the matters detailed in the Special Prosecutor's reports related to the murder of Frascone and the motive for the murder, applied to the division of the court, with the consent of Special Prosecutor Silverman, for disclosure of particularly defined excerpts of the Special Prosecutor's unredacted reports, including investigatory records procured or generated during the investigation by the Special Prosecutor.

In orders of February 27, 1984, July 30, 1984, and August 17, 1984, the division of the court granted these requests, and disclosed materials which were limited to those

records, referred to in the reports and in the custody of the division of the court, which related specifically to the subject of the Bronx, New York investigation, the murder of Salvatore Frascone, and particular individuals involved in that investigation. The orders limited disclosure to particular documents, some of which had been obtained during previous state and Federal investigations, interviews of witnesses, some of which had been conducted during previous Federal investigations, and grand jury testimony. All materials disclosed by the division of the court were limited to particularly specified portions of the reports which related to specific subject-matters relevant to the Bronx, New York investigation, and included limited excerpts of grand jury testimony annotated in those portions of the reports. The division of the court ordered the same limitations on further disclosure as it had in its November 12, 1982 order, *i.e.*, that no disclosure of the contents of these materials be made except to a grand jury in Bronx County, New York and other government personnel necessary to investigate and present evidence before a grand jury and to enforce the laws of the State of New York. Pursuant to these orders by the division of the court, evidence contained in the materials was presented to the Grand Jury of Bronx County, New York.

In September 1984, the Office of the District Attorney of Bronx County, New York notified petitioner and the other parties listed in petitioner's brief, p. ii, that a grand jury investigation was under way and afforded them the opportunity to testify after waiving the transactional immunity automatically conferred by an appearance before a New York grand jury. Thereafter, petitioner and some of the other parties made applications to the division of the court

in the same manner as the District Attorney of Bronx County, New York had done. The division of the court disclosed to petitioner his entire grand jury testimony, relating to all of the numerous allegations investigated by the Special Prosecutor. In addition, the division of the court disclosed to petitioner interviews conducted by agents of the Special Prosecutor of at least one witness who testified before the Bronx County, New York grand jury.

On October 2, 1984, two indictments returned by the Grand Jury of Bronx County, New York were unsealed in New York Supreme Court, Bronx County. One indictment charged William P. Masselli and another with the murder of Salvatore Frascone. The other indictment charged petitioner, Masselli, eight other individuals, and two corporations with 137 counts of grand larceny, falsifying business records, and offering a false instrument for filing.

On November 19, 1984, the division of the court granted two applications: one by petitioner for disclosure of all motion papers filed by the District Attorney of Bronx County, New York and all orders of the division of the court concerning such motions; another by respondents for disclosure of all documents to all defendants in the Bronx, New York criminal cases (see Appendix).

On December 5, 1984, the division of the court denied petitioner's motion, without requesting a response from respondents, for an order (1) vacating the prior orders by the division of the court, which authorized disclosure of specified documents and materials to the District Attorney of Bronx County; and (2) requiring respondents to return the materials to the division of the court.

ARGUMENT

POINT ONE

The United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, had the statutory authority to order the disclosure of investigatory records, including grand jury materials, procured or generated during the investigation by Special Prosecutor Leon Silverman to the District Attorney of Bronx County, New York [answering Petitioner's brief, Point I, pp. 9-10]

Petitioner claims that the division of the court had no jurisdiction over grand jury materials created by the Special Prosecutor during his investigation that were not included in the Special Prosecutor's report, and that the division of the court was without authority to order disclosure of such grand jury materials. Respondents submit that the statutes which established the division of the court and defined its powers and duties provided authority for the division of the court to order the disclosure of investigatory records, including grand jury materials, procured or generated by Special Prosecutor Leon Silverman to the District Attorney of Bronx County, New York.

The Ethics in Government Act of 1978 [28 U.S.C. §§ 591-598, ch. 39; Pub.L. 95-521, Title VI, §§ 601(a), 602 (a), Oct. 26, 1978, 92 Stat. 1867-1873, and amended Pub.L. 97-409, §§ 2-6, Jan. 3, 1983, 96 Stat. 2039-2042] created a division of the United States Court of Appeals for the District of Columbia Circuit and defined its specific duties and powers [28 U.S.C. §§ 593(a), 49]. In enacting these

provisions, Congress specified that a special court of three judges would be assigned to the division of the court and would assume the responsibilities set forth in the Act [28 U.S.C. §§ 49(a), (f)]. Moreover, Congress directed that priority in assigning judges to sit on such division of the court shall be given to senior circuit judges and retired justices, assigned by the Chief Justice of the United States, from three different courts [28 U.S.C. §§ 49(c), (d)]. The legislative history indicates that by giving priority to senior circuit judges and retired justices, the members of the special division would not be sitting on matters involving the Department of Justice on a day-to-day basis. Thus, the provision is a safeguard against the possibility of conflicts of interest on the part of the judges assigned. Moreover, as the special division would be dealing with very sensitive matters of great concern to the Administration and other elected officials, the assignment of retired judges would further reduce the possibility of conflicts of interest since, as retired judges, their ambitions would have been largely achieved. In addition, the assignment of judges from different courts is advantageous because the matters to be determined by the division are not of a local nature [see S.Rep. No. 95-170, 95th Cong., 2d Sess., pp. 36, 64, 77-78, 79, *reprinted in* 1978 U.S. Code Cong. and Adm. News, pp. 4252, 4280, 4293-4294, 4295]. Clearly, Congress intended that an independent division of the United States Court of Appeals for the District of Columbia Circuit, made up of judges from different courts who would be free from potential conflicts of interest, would have the exclusive responsibilities set forth in Chapter 39 of Title 28.

An independent counsel appointed by the division of the court has full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except as to matters concerning authorization for interception of wire or oral communications. Such investigative and prosecutorial functions and powers include conducting proceedings before grand juries and other investigations, and reviewing all documentary evidence available from any source [28 U.S.C. §§ 594(a)(1), (a)(4); see S.Rep. No. 95-170, *supra*, at 35, 66, *reprinted in* 1978 U.S. Code Cong. and Adm. News, *supra*, at 4251, 4282; see also S.Rep. No. 97-496, 97th Cong., 2d Sess., p. 2, *reprinted in* 1982 U.S. Code Cong. and Adm. News, p. 3538]. Before termination of his office, an independent counsel must submit to the division of the court a report, which must set forth fully and completely a description of the work of the independent counsel [28 U.S.C. §§ 595(b)(1), (b)(2)]. The legislative history indicates that the mandatory final report was considered by the Committee to be very important to ensure the accountability of a special prosecutor, in light of his enormous power and responsibility. The final report would provide a detailed document to permit the evaluation of the performance of a special prosecutor at an appropriate time. The report must set forth a full and complete description of the work of the special prosecutor, and must be in sufficient detail to allow a determination of whether the special prosecutor's investigation was thoroughly and fairly completed. The report would be a detailed and official record of the activities of the special prosecutor which may be reviewed

and analyzed at the appropriate time [see S.Rep. No. 95-170, *supra*, at 36, 70-71, *reprinted in* 1978 U.S. Code Cong. and Adm. News, *supra*, at 4252, 4286-4287].

The facts in the case at bar demonstrate that Special Prosecutor Leon Silverman submitted to the division of the court two final reports which detailed (1) the contents of documents obtained by the Special Prosecutor and the grand jury; (2) the substance of interviews of witnesses conducted by the Federal Bureau of Investigation in previous investigations; (3) the substance of interviews of witnesses conducted by the Special Prosecutor's staff; and (4) the substance of testimony before the grand jury. The reports not only described the contents of the information gathered, but supported the text with annotations to documents, exhibits, and grand jury minutes. All investigatory records, including grand jury materials, were supplied to the division of the court with the reports and remain in the exclusive custody and control of the division of the court.

Among the duties and powers of the division of the court, Congress declared that the division of the court may disclose investigatory records procured or generated under Chapter 39 of Title 28. Pursuant to Title 28, United States Code, section 592(d)(2), no application or any other documents, materials, or memorandums supplied to the division of the court under this chapter shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court. According to the legislative history, this provision requiring confidentiality unless the court directs otherwise is crucial to the general scheme of this chapter.

The Committee felt that it was appropriate for such decisions as to what should and should not be made public to be made by the division of the court [see S.Rep. No. 95-170, *supra*, at 56, 57-58, 64, *reprinted in* 1978 U.S. Code Cong. and Adm. News, *supra*, at 4272, 4273-4274, 4280].

Pursuant to Title 28, United States Code, section 595 (b)(3), the division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. According to the legislative history, the handling of the report, its release and the opportunity for rebuttal are within the control and discretion of the court. The Committee felt that there may be situations where the release of the report or parts of the report would not prejudice the rights of any individual or prejudice any ongoing prosecution. In addition, the Committee strongly felt that detailed information about the activities of the office of special prosecutor should be recorded and preserved and made available to the public and the Congress when the court deems appropriate [see S.Rep. No. 95-170, *supra*, at 36, 71, *reprinted in* 1978 U.S. Code Cong. and Adm. News, *supra*, at 4252, 4287; see also S.Rep. No. 97-496, *supra*, at 3, *reprinted in* 1982 U.S. Code Cong. and Adm. News, *supra*, at 3539].

It is clear, therefore, that Congress intended that a special division of the court, appointed under circumstances assuring its independence and impartiality, would

have the exclusive responsibility to control the disclosure of investigatory records, including grand jury materials, submitted to the division of the court by a special prosecutor or independent counsel. In the case at bar, those investigatory records were procured or generated by Special Prosecutor Leon Silverman pursuant to his powers as defined by the Act, including the power to conduct grand jury proceedings and investigations, and to review all documentary evidence available from any source. All investigatory records, including documents obtained, interviews of witnesses and grand jury minutes, were submitted to the division of the court with the final reports by the Special Prosecutor, and remain in the exclusive custody and control of the division of the court. In fact, the reports summarize the contents of those interviews and testimony, and supply annotations to the documents and grand jury minutes. Congress specifically empowered the division of the court to disclose such investigatory records supplied to it under the Act, including applications, documents, materials, memorandums, and portions of the final report, to any appropriate person upon a proper application, as the division deems appropriate. Congress also empowered the division of the court to order disclosure under appropriate restrictions to protect the rights of individuals named in the final report.

In the case at bar, four proper applications by the District Attorney of Bronx County, New York, with the consent of Special Prosecutor Leon Silverman, were made to the division of the court. The division of the court ordered disclosure of particularly defined excerpts of the Special Prosecutor's unredacted reports, including in-

vestigatory records in the custody of the division of the court, and limited excerpts of grand jury testimony annotated in those portions of the reports. Disclosure was ordered under specific restrictions not to further disclose the materials except to a Bronx County, New York, grand jury and other necessary government personnel. Pursuant to these orders by the division of the court, evidence contained in the materials was presented to the Grand Jury of Bronx County, New York. When the Office of the District Attorney of Bronx County notified petitioner and the other parties listed in petitioner's brief, p. ii, that a grand jury investigation was in progress and afforded them the opportunity to testify after waiving the transactional immunity automatically conferred by an appearance before a New York grand jury, petitioner and some of the other parties made applications to the division of the court in the same manner as the District Attorney of Bronx County, New York, had done. Petitioner received his entire grand jury testimony as well as interviews of at least one witness who testified before the Bronx County, New York, grand jury. After the Grand Jury of Bronx County, New York, had returned an indictment against petitioner and others, a further application to the division of the court by petitioner for disclosure of all motion papers and orders was granted. In addition, an application to the division of the court by respondents for disclosure of all documents to all defendants in the criminal case was also granted (see Appendix).

It is plain that both respondents and petitioner requested the division of the court to exercise its powers under the Ethics in Government Act of 1978. It is also plain that the division of the court properly exercised its

statutory authority to order the disclosure of investigatory records, including grand jury materials, procured or generated during the investigation by Special Prosecutor Leon Silverman, to both the District Attorney of Bronx County, New York, and petitioner. This exercise of discretion by the division of the court does not present such an important question of Federal law which would justify the issuance of a writ of certiorari.

POINT TWO

The requirements of Fed.R.Crim.P. 6(e)(3)(C)(i), 6(e)(3)(D), were satisfied by application to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, pursuant to 28 U.S.C. §§ 592(d)(2), 595(b)(3) [answering Petitioner's brief, Point II, pp. 11-17].

Petitioner claims that the applications made by the District Attorney of Bronx County, New York to the division of the court violated the requirements of Fed.R.Crim.P. 6(e)(3)(C)(i), 6(e)(3)(D) because (1) the Bronx County, New York grand jury investigations were not judicial proceedings; (2) the applications were not filed in the district where the grand jury convened; (3) no written notice of each application was served on petitioner; (4) the District Attorney of Bronx County, New York did not seek a limited disclosure of grand jury materials but instead requested entire grand jury transcripts; and (5) the District Attorney of Bronx County, New York did not sufficiently show the necessity for disclosure of grand jury materials. Respondents submit that (1) the division of the court properly or-

dered disclosure of grand jury materials preliminarily to or in connection with a judicial proceeding; (2) the applications were properly made to the court under which the grand jury was empaneled and which had exclusive custody and control of the grand jury materials; (3) written notice of each application was served on Special Prosecutor Leon Silverman as attorney for the government, who consented to the applications, but not on petitioner, who was not a party to the Bronx County grand jury proceedings; (4) only limited and specifically relevant excerpts of grand jury materials were requested by the District Attorney of Bronx County, New York, and granted by the division of the court; and (5) the District Attorney of Bronx County, New York sufficiently showed the necessity for disclosure of the grand jury materials requested.

The applications to the division of the court pursuant to 28 U.S.C §§592(d)(2), 595(b)(3) were consistent with and satisfied the requirements of Fed.R.Crim.P. 6(e)(3)(C)(i), 6(e)(3)(D). Under Rule 6(e)(3)(C)(i), a court may direct disclosure of grand jury materials "preliminarily to or in connection with a judicial proceeding." The phrase "in connection with" refers to a judicial proceeding already pending, while the phrase "preliminarily to" refers to one not yet initiated. The Rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated. The focus is on the actual use to be made of the material and whether the primary purpose of disclosure is to assist in the preparation or conduct of a judicial proceeding [*United States* v. *Baggott,* 463 U.S. 476, 77 L.Ed.2d 785, 790-791 (1983)]. A planned state investigation which may result in criminal prosecution in a state court is "preliminary to" a judicial proceeding [*In Re Grand Jury Mat-*

ter, 682 F.2d 61, 65 (3d Cir. 1982)]. Without doubt, the grand jury is a part of the judicial process, and a proceeding before a grand jury constitutes a judicial inquiry [*Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940)]. Clearly, disclosure to a state grand jury is encompassed by the Rule [*In Re Disclosure of Evidence*, 650 F.2d 599, 601 (5th Cir. 1981)]. There is no question, therefore, that the orders by the division of the court directed disclosure of grand jury materials preliminarily to or in connection with a judicial proceeding, since disclosure was permitted for use in pending Bronx County, New York grand jury investigations into the murders of Nat Masselli and Salvatore Frascone.

Requests for disclosure of grand jury materials under the Rule should be directed to the court under whose auspices the grand jury was empaneled because that is the court which supervised the grand jury and the only court with control over the transcripts and records. Moreover, policies dictate that the grand jury's supervisory court participate in reviewing requests for disclosure, as it is in the best position to determine the continuing need for grand jury secrecy. In addition, the government attorneys who worked with the court and the grand jury are more likely to be informed about the grand jury proceedings than those elsewhere [*Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 225-226 (1979); *In Re Special Grand Jury (For Anchorage, Alaska)*, 674 F.2d 778, 782-784 (9th Cir. 1982); *United States* v. *Penrod*, 609 F.2d 1092, 1097 n.8 (4th Cir. 1979)]. In the case at bar, although the grand jury sat in the Eastern District of New York, it was empaneled by the division of the United States Court of Appeals for the District of Columbia Circuit for the Purpose of Appointing In-

dependent Counsel pursuant to the Ethics in Government Act of 1978. The division of the court, specially created to appoint independent counsel and carry out the powers and duties authorized by the Act, had particular responsibilities related to the work of the grand jury and had direct and sole custody and control of the grand jury transcripts, documents, exhibits, and other materials. Since the division of the court was in the best position to review requests for disclosure, applications for disclosure were properly directed to that court.

Written notice of each of the applications by the District Attorney of Bronx County, New York was served in accordance with Rule 6(e)(3)(D). The attorney for the government who worked with the court and the grand jury, and who was fully familiar with the grand jury proceedings, was Special Prosecutor Silverman. Upon notification, the Special Prosecutor consented to the applications. Petitioner was not a party to the judicial proceeding since the Bronx County, New York grand jury investigation was an *ex parte*, secret proceeding and consequently, service of notice on petitioner was not required by the Rule. At the pre-indictment stage of an ongoing grand jury investigation, an adversary hearing is not mandated.

Under Rule 6(e), parties seeking grand jury transcripts must show that the material is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material needed [*Douglas Oil Co.* v. *Petrol Stops Northwest, supra,* at 222]. This Court has also stated that a limited dis-

closure may be ordered upon a showing of a compelling necessity and a particularized need [*United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 682, 683 (1958)]. In the case at bar, the particularized need was shown by (1) the obvious close nexus between the grand jury investigation by the Special Prosecutor and the murder of Nat Masselli; and (2) the inter-relationship between some subjects of the Special Prosecutor's investigation, namely Schiavone Construction Company, Jopel Contracting and Trucking Corporation and Nargi Contracting and Trucking, and the motive for the murder of Salvator Frascone. The division of the court and the Special Prosecutor, fully familiar with the work of the grand jury, was apprised of these inter-relationships and the apparent need for the materials. Similarily, the division of the court was aware of the compelling necessity for these materials in view of the absence of any other source and the inability to utilize compulsory process, since a compelled appearance before a New York grand jury automatically confers transactional immunity on a subpoenaed witness. Thus, these factors supported disclosure to avoid a possible injustice.

It is clear that the *Douglas Oil* standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others. The standard accommodates any relevant considerations, such as the fact that disclosure to government movants poses less risk of further leakage or improper use than disclosure to private parties or the general public. Nothing in *Douglas Oil* requires the court to pretend that there are no differences between governmental bodies and private parties. The court may weigh the public interest served by dis-

closure to a governmental body [*United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 77 L.Ed.2d 743, 766 (1983); *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 567 n.15 (1983)]. Thus, disclosure is appropriate where the need for the materials outweighs the public interest in secrecy. As the considerations justifying secrecy become less relevant, the propriety of disclosure is less burdensome to demonstrate. Moreover, the court may include protective limitations on the use of disclosed materials [*Douglas Oil Co.* v. *Petrol Stops Northwest, supra*, at 223]. In the case at bar, the need for disclosure was clearly greater than the need for continued secrecy. The grand jury had completed its investigation, and its findings, contained in the Special Prosecutor's reports, had been released to the public by the division of the court. The public versions of the reports had detailed the substance of the grand jury materials sought, and the division of the court, in disclosing the materials to the District Attorney of Bronx County, New York, strictly limited further disclosure to a Bronx County, New York grand jury and necessary government personnel. The public interest served by disclosure to the District Attorney of Bronx County, New York, was surely considered by the division of the court.

The applications for disclosure were specifically structured to cover only the materials needed. The requests involved only specifically enumerated subject-matters and individuals, and the orders by the division of the court limited disclosure to specific documents, interviews and testimony summarized and annotated in the Special Prosecutor's reports. Disclosure included only limited excerpts of grand jury testimony, not the wholesale disclosure of

all grand jury materials, including reams of documents and hours of testimony previously found to be improper by this Court [see *Illinois* v. *Abbott Associates, Inc., supra,* at 564 n.8, 567 n.15].

The division of the court, infused with substantial discretion to determine whether to disclose grand jury materials [*Douglas Oil Co.* v. *Petrol Stops Northwest, supra,* at 223; *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 399 (1959)], exercised its discretion on behalf of respondents as well as petitioner, who made applications to the division of the court in the same manner as respondents had done. The issuance of a writ of certiorari to review this exercise of discretion is not warranted because an important question of Federal law has not been presented.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Mario Merola
District Attorney
Bronx County
Attorney for Respondents

Stephen R. Bookin
Assistant District Attorney
Of Counsel

April 1985

APPENDIX

Appendix

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of Appointing Independent Counsel Ethics in Government Act of 1978

In Re: Secretary of Labor Raymond J. Donovan — September Term 1984 No. 81-2

BEFORE: Robb, Senior Circuit Judge, Presiding, Morgan, Senior Circuit Judge, and Mansfield*, Senior Circuit Judge

ORDER

Upon consideration of the motion of Raymond J. Donovan for disclosure of all moving papers filed by the Bronx County (New York) District Attorney and all orders of the court granting or denying such motions, and upon consideration of the motion of Stephen R. Bookin, Esquire, on behalf of the District Attorney of Bronx County, New York, for disclosure of documents to all defendants indicted with Secretary Donovan in Indictment No. 1371-84, it is

ORDERED, by the Court, that the motion of Raymond J. Donovan is granted and that Leon Silverman, the former Special Prosecutor, is authorized to furnish to Raymond J. Donovan copies of all moving papers filed by the Bronx County District Attorney's office in support of its applications for access to the files and records of Special Prosecutor Leon Silverman and of the orders of this Division entered upon such applications. And it is

* Senior Circuit Judge Mansfield did not participate in the foregoing order.

FURTHER ORDERED, by the Court, that the motion filed on behalf of the District Attorney of Bronx County is also granted and the said District Attorney is hereby authorized to make available to all defendants indicted with Secretary Donovan in Indictment No. 1371-84 copies of all investigatory records procured or generated during the investigation of Special Prosecutor Leon Silverman which were previously disclosed to the District Attorney of Bronx County, New York. And it is

FURTHER ORDERED, by the Court, that the foregoing motions are granted upon the following conditions:

1. The defendants and counsel may not make additional copies of these materials or portions thereof without the prior express permission of this Court.
2. The defendants and counsel shall only disclose information contained in the materials when giving testimony under oath or affirmation at the trial or hearing of this action.
3. Immediately upon the termination of all proceedings, counsel for the defendants shall deliver the copies of the materials, together with any additional copies made by them pursuant to court order, to this Court for the purpose of being sealed and preserved with the records of this case.

Per Curiam

For the Court:

s/ GEORGE A. FISHER

GEORGE A. FISHER, Clerk

DATED: Washington, D.C.
November 19, 1984

Office - Supreme Court, U.S.
FILED
APR 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RAYMOND J. DONOVAN,

Petitioner,

v.

MARIO MEROLA, District Attorney,
Bronx County, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DIVISION FOR THE PURPOSE OF APPOINTING INDEPENDENT COUNSEL, ETHICS IN GOVERNMENT ACT OF 1978

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PRELIMINARY STATEMENT

Petitioner Raymond J. Donovan respectfully submits this reply to the brief of Mario Merola, District Attorney of Bronx County, New York, the only respondent who has opposed Mr. Donovan's petition for a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978 (the "Special Court").[1]

1 Significantly, neither the Justice Department nor former Special Prosecutor Leon Silverman opposes this petition.

The District Attorney's brief to this Court is a howling wilderness of misstatements both of fact and of law. That brief conceals the real issues before this Court and attempts retroactively to put on the record matters that should have been—but were not—disclosed long ago. In sum, as we shall demonstrate below, the District Attorney seeks to justify his conduct by resorting, too late, to totally baseless arguments that, even if they had been raised at the proper time, could never have justified a disclosure of federal grand jury materials.

Before addressing the purported legal arguments in the District Attorney's brief, we must set the record straight as to certain portions of his Statement of the Case. Leaving aside the portions of the District Attorney's self-serving narrative that are not relevant to this petition, in the first full paragraph on page 4 of the District Attorney's brief and again on pages 5-6, the District Attorney repeatedly, deliberately, and misleadingly uses the word "limited" to describe the disclosures by the Special Court to him of grand jury records. The record demonstrates that this characterization is just plain wrong. For, in every instance, the Special Court granted *precisely* the disclosure sought by the District Attorney, without any limitation whatsoever. In other words, the District Attorney takes the preposterous position that, when, without making the requisite showing of need, he received everything he asked for, that receipt was "limited," since he did not ask for the entire grand jury record.

ARGUMENT

POINT I

THE SPECIAL COURT LACKED JURISDICTION TO ORDER DISCLOSURE OF THESE MATTERS THAT OCCURRED BEFORE THE GRAND JURY

The District Attorney engages in a long and largely irrelevant discussion of the legislative history of the Ethics in Government Act in an attempt to demonstrate that the Special

Court had jurisdiction over the minutes of the grand jury. The District Attorney's argument, however, fails to show (as it must if the District Attorney is to prevail) that the grand jury transcripts disclosed to him are "portions" of the Special Prosecutor's report. The Special Prosecutor's report is *all* that the Special Court has jurisdiction to release. 28 U.S.C. § 595(b)(3) (1982). The mere fact that the grand jury minutes were filed and stored with the Clerk of the Special Court does not, of course, make them part of the report. The Ethics in Government Act surely does not make these grand jury materials part of the report. The report itself does not incorporate them. Indeed, former Special Prosecutor Leon Silverman has stated that they were not part of the report. Thus, the repeated attempts in the District Attorney's brief to equate portions of the report to records over which the Special Court has jurisdiction is both unsupported and false.

POINT II

THE BRONX DISTRICT ATTORNEY'S APPLICATIONS TO THE SPECIAL COURT AND THE SUBSEQUENT DISCLOSURES VIOLATED RULE 6(e)

The District Attorney argues that his applications for disclosure of grand jury materials were made to the correct court and that such applications sufficiently demonstrated compelling necessity or particularized need for such materials. He is clearly wrong on both counts.

First, at page 17 of his brief, the District Attorney asserts that the grand jury whose record is at issue here was "empaneled" by the Special Court. This is simply not true. Not only does the Special Court lack jurisdiction to empanel grand juries, but the record in this case demonstrates that the grand jury was empanelled by the United States District Court for the Eastern District of New York. Moreover, Rule 6(e)(3)(D) of the Federal Rules of Criminal Procedure requires that "[a] petition for disclosure pursuant to subdivision (e)(3)(C)(i) *shall be filed* in the *district* where the grand jury convened." (emphasis

added) Thus, the rule required the District Attorney to petition the District Court in the Eastern District of New York. His circumvention of the rule by petitioning the Special Court was plainly unauthorized and illegal.

The District Attorney attempts to excuse his further violation of Rule 6(e) in failing to notify Mr. Donovan of the application for grand jury materials by stating that:

> "Petitioner was not a party to the judicial proceeding since the Bronx County, New York grand jury investigation was an *ex parte*, secret proceeding and consequently, service of notice on petitioner was not required by the Rule." Respondent's Brief in Opposition at 18.

The District Attorney's *ipse dixit* fails to mention, however, that Rule 6(e)(3)(D) mandates that (even assuming *arguendo* that the Bronx County grand jury investigation was a "judicial proceeding") his application for disclosure could not be *ex parte*, for such an *ex parte* application can be made only by the federal government. Moreover, even in his illegal "*ex parte*, secret" applications to the Special Court for disclosure of grand jury materials, he did not identify Mr. Donovan or any of the other officers or employees of Schiavone Construction Company as possible targets of his investigation. Nor did he serve written notice on either the Justice Department or any of his *identified* targets.[2] Had he done so, Mr. Donovan, the Justice Department, and others would have had an opportunity to be heard. Instead, as demonstrated in the affidavit of Paul J. Curran (A. 25-26), the District Attorney affirmatively misrepresented to the Special Court the nature of the grand jury investigation, apparently to avoid just such notice to Mr. Donovan.

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2 It is clear that the District Attorney should also have notified the federal grand jury witnesses whose testimony he sought, as well as the owners of documents subpoenaed by the federal grand jury. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 n.8 (1979).

Finally, the District Attorney asserts lamely that his applications to the Special Court demonstrated compelling necessity or particularized need.[3] A mere reading of the four applications establishes that they did not even come close to meeting this test. Further, it is plain that the claims now put forth to satisfy this requirement (at pages 19-21 of the District Attorney's brief to this Court) were never presented to the Special Court at all. Thus, the District Attorney now states, without record support, at page 19 of his brief:

> "Similarly, the division of the court was aware of the compelling necessity for these materials in view of the absence of any other source and the inability to utilize compulsory process, since a compelled appearance before a New York grand jury automatically confers transactional immunity on a subpoenaed witness. Thus, these factors supported disclosure to avoid a possible injustice."

In so stating he asks this Court to accept a rationale that he never presented to the Special Court and which the Special Court never had the opportunity to consider, let alone rule upon.

The propriety of this belated claim of particularized need is, in any event, highly dubious, since, as the District Attorney admits, he sought the federal grand jury materials in order to *deprive* various individuals of *rights* granted to them under the laws of New York State. In this regard he fails to mention that, on September 24, 1984, Mr. Donovan waived immunity and testified voluntarily before the Bronx County grand jury. (A. 22) Thus, as to Mr. Donovan, even this argument is totally devoid of merit.

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3 The true extent of the District Attorney's lack of "need" for the federal grand jury transcripts was revealed when the prosecutors selectively read excerpts from them to the Bronx grand jury. Indeed, a large part of the grand jury presentation in the Bronx consisted of prejudicially edited federal grand jury testimony obtained from the Special Court in violation of Rule 6(e).

In sum, the record shows that the Special Court lacked jurisdiction to release these grand jury materials. Moreover, even if, *arguendo*, it had jurisdiction, the District Attorney's applications failed totally to comply with the requirements of Rule 6(e).

CONCLUSION

For the reasons stated herein and in the petition for a writ of *certiorari*, the petition should be granted.

Dated: April 17, 1985

Respectfully submitted,

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